In the Supreme Court of the United States.

OCTOBER TERM, 1915. No. 139.

Pennsylvania Railroad Company, Plaintiff in Error,

vs.

W. F. Jacoby & Co., Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

No attempt is made in the Brief of the defendants in error to controvert the statement of the law embodied in the following point or request to charge submitted by the plaintiff in error which was affirmed by the trial Judge.

> "It was the duty of the defendant to apportion and deliver to the plaintiffs their fair share of all the cars available during the period of the action, for shippers in the district in which the plaintiffs' mine was located. If the plaintiffs received their fair and proper share of the cars so distributed in the district, they have no cause for complaint against the defendant upon the ground of discrimination, and the burden is upon the plaintiffs to establish by satisfactory proof, that they did not receive their share."
>
> (Transcript of Record, page 130.)

This instruction was further amplified or emphasized by the District Judge in the following extract from his general charge:—

> "If one company got half of the cars which were distributable for that system when it was only entitled to one quarter—then the amount that the other shippers, the other mine owners, would be damaged would be the amount to which their share would be diminished by giving that larger allotment to somebody else."
>
> (Transcript of Record, page 129.)

These instructions embodied a rule or principle so incontrovertible, that counsel for the defendants in error have not undertaken to question or deny its accuracy.

Accepting as correct the instructions of the District Judge, the burden was upon the defendants in error to establish by satisfactory proof that they had not received their fair share of the cars distributed in the district or region in which their mine was located. The obligation thus devolved upon them was met, as they claim, by the introduction in evidence of the finding of the Interstate Commerce Commission that the defendants in error should have received in the two periods into which the Commission divided the period of the action cars equal to 59.9 per cent. and 59.6 per cent., respectively, of their mine's rating.

The Commission did not specifically find that the cars should have been equal to these percentages, but it is a mathematical demonstration that the cars required for the tonnage for which the Commission found cars should have been received would have been equal to these percentages. (Transcript of Record, page 110.)

If these percentages were the percentages which the defendants in error would have received had they received their fair share of the cars available for distribution in the region in which their mine was located, then the Commission's finding, when put in evidence, made out a *prima facie* case for the defendants in error, but if these percentages did

not represent the *pro rata* or fair share of the defendants in error, but something else, then we submit that the submission in evidence of the finding of the Commission did not establish a *prima facie* case.

That the Commission's percentages did not represent the percentages which the defendants in error would have received, if they had received their proper share of the cars distributed in the region is, we submit, demonstrable.

The testimony established that in the two periods which the Commission's award dealt with, the cars placed at the mines in the region in which the defendants in error's mine was located amounted to 30.3 per cent. and 39.9 per cent., respectively, of the aggregate ratings of the mines in the region. (Transcript of Record, page 123.)

The Commission found that the defendants in error should have received in these two periods *59.9 per cent.* and *59.6 per cent.*, respectively, of their mine's rating. (Transcript of Record, page 110.)

These latter percentages were the precise percentages that certain mines which the defendants in error alleged had been unduly preferred had received in the two periods covered by the award. (Transcript of Record, pages 104 and 105.)

The conclusion, therefore, is irresistible that the Commission's finding as to the number of cars which the defendants in error should have received was based not upon the number which they would have received had a distribution been made of all available in accordance with the Commission's rule of distribution, but upon the number which certain mines had received which the defendants in error contended had been preferred in the distribution.

In other words, the Commission proceeded upon the theory that the defendants in error had sustained "injury" within the meaning of Section 8 of the Interstate Commerce Act because they had not received relatively the same number of cars that other mines had received which the defendants in error asserted had been favored in the distribution.

In our main brief we have called attention to the fact that the large number of cars delivered at these so-called "preferred" mines may well have been accounted for by the fact that they were receiving individual and fuel cars, and the mere fact, therefore, that in the aggregate they had received a larger percentage than the region percentage did not of itself tend to establish any preferential treatment on the part of the plaintiff in error.

But apart from this consideration the number of cars which these mines received was not the measure of the defendants in error's rights.

No attempt has been made by counsel for the defendants in error to sustain the theory upon which the Commission acted in arriving at the number of cars which the defendants in error should have received, but the contention is apparently made that the finding of the Commission on this point was an administrative finding and was consequently not reviewable by the Courts.

Manifestly, however, such a theory or view is not sustainable. The finding of the Commission as to the general rule of distribution that should have been followed by the plaintiff in error was an administrative finding, and consequently not reviewable. But the question whether the plaintiff in error violated this rule to the injury of the defendants in error is clearly not of the same character. If it were, the Courts could not entertain primary jurisdiction of cases in which such a question was involved. This Court, however, has held that the Courts have primary jurisdiction where the issue involved is whether the carrier had or had not made distribution in accordance with prescribed rules.

Morrisdale Coal Company *vs.* Pennsylvania Railroad Company, 230 U. S. 304;

Pennsylvania Railroad Company *vs.* Puritan Coal Mining Co., 237 U. S. 121.

The proposition, therefore, that in the present instance the finding of the Commission was conclusive is not sustainable.

The case, therefore, as presented to the District Court was this: the action was one to recover the amount of the award made by the Commission. (See fourth prayer of petition, Transcript of Record, page 11.)

The action was so brought because in the opinion of counsel for defendants in error Section 16 of the Interstate Commerce Act defines the action to be brought as of this character. "It is not the ordinary suit for damages, at common law," says counsel in his brief, "but *'a petition for the enforcement of an order for the payment of money.'*" (See Brief of defendants in error, page 38.)

To sustain their case the defendants in error offered in evidence only the findings of the Commission. If these findings, therefore, were erroneous for any reason, they afforded no basis for an assessment of damages by the jury. And this is true, whether we regard the action as one for the recovery of the award or for damages, for in either case it would be incumbent upon the defendants in error to make out their case by competent proof, and if the proof offered did not enable the jury to determine what cars the defendants in error should have received, then there was no predicate for any award of damages by the jury.

Assume that the action had been one to recover damages for discrimination in the distribution of cars, and that there had been no prior award made by the Commission. And assume that the only testimony in support of the defendants in error's claim had been that of a witness who had testified as to the percentage which certain mines, which it was alleged had been preferred in the distribution, had received. Manifestly, it would appear if the percentage which these mines had received was not the measure of the defendants in error's rights, the Court would have been obliged to instruct the jury that the defendants in error had failed to offer any proof which would justify a verdict in their favor.

In the present case, of course, we have in lieu of the evidence of the witness the finding of the Commission,

but if this finding is based upon an erroneous principle, it no more tends to sustain the defendants in error's case than would the testimony of the witness in the case supposed.

The defendants in error, however, urge that they were entitled to have the Commission's finding go to the jury as a finding of fact, and furthermore, that the learned Judge of the District Court, was therefore, justified in refusing to instruct the jury, as requested by the plaintiff in error, that if they found that the defendants in error, had they received their *pro rata* share of the cars distributable in the region, would not have received the percentages which the Commission's finding was based upon, that then the finding was erroneous and the verdict should be for the plaintiff in error.

The Interstate Commerce Act of course makes a finding of fact of the Commission *prima facie* evidence of the facts found therein, but certainly this does not extend to findings of fact which are based upon an erroneous construction of law and which are erroneous in principle.

Unquestionably under the decisions of this Court the present action could have been instituted in a Federal Court if the defendants in error had so elected. They preferred, however, to proceed before the Commission, but clearly the Commission in determining the rights of the defendants in error under the rule of distribution which it had prescribed was controlled by the same legal considerations which would have been controlling upon the Court had the action been instituted there, and if, therefore, a Court, if, called upon to determine the question, would have ruled that the defendants in error had been injured only to the exent to which they had been deprived of cars which they would have received had a proper distribution been made, then necessarily the Commission should have likewise ruled and its ruling or finding to the contrary necessarily lacks the sanction of law, and cannot support a recovery based upon a rule or principle of law which the Court would have been

obliged to reject as unsound if it had been advanced in a case instituted in the Court rather than before the Commission.

The learned District Judge instructed the jury that the measure of the defendants in error's rights was not the percentage received by some other shippers, but their proper *pro rata* share under the Commission's rule of distribution of the cars available for distribution. If this was a correct instruction, and its correctness has not been denied or questioned by counsel for the defendants in error in the present case, then it would clearly seem to follow that a finding by the Commission of the number of cars which the defendants in error should have received, which was admittedly based not upon the law as expounded by the Court, but upon a mistaken view of the law, ought to have been excluded from the consideration of the jury, and as there was no evidence upon which the defendants in error could recover, the jury ought to have been instructed, we submit, that the defendants in error had failed to make out a case and were not entitled consequently to a verdict.

FREDERIC D. McKENNEY,
FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Plaintiff in Error.

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IN THE

Supreme Court of the United States.

No. 139. October Term, 1915.
No. 22. October Term, 1916.

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

W. F. JACOBY & COMPANY,
Defendants-in-Error.

On Certificate from and Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR DEFENDANTS-IN-ERROR IN REPLY TO PETITION OF PENNSYLVANIA RAILROAD COMPANY FOR A REARGUMENT.

The petition of the plaintiff-in-error for a reargument or a modification of judgment in the above case follows the lines of their original brief. The grounds upon which a reargument is asked are two in number: (1) That the award of damages by the Com-

mission should have been declared invalid by the trial Judge; (2) that the commission in awarding damages made their calculation upon the basis of another system of car distribution than that which they had themselves declared to be the right system in their contemporaneous report in the Hillsdale case (quoted in Petition for Reargument, p. 5). As the latter proposition is alleged, in the petition, as the sole ground of the invalidity of the award, the two grounds assigned may be more simply stated thus: That the award was made up by the use of an improper and unfair method of calculation on the part of the Commission; and that the Court should therefore have charged the jury that the award was invalid.

The difficulty which the proponent of these propositions meets at the outset, lies in the question: "How do you show from the Record in this case in the District Court, on what basis the Commission made up its award?" We have in evidence the reports and award of the Commission, containing administrative findings of fact; first, of discriminations practiced by plaintiff-in-error against defendants-in-error; and, second, the tonnage which Jacoby & Co. would have shipped if they had received "their fair share of the cars," with also the primary facts upon which these ultimate facts are based. P. R. R. vs. Clark Coal Co., 238 U. S. 456, at p. 463. But none of these contain any statement of what class of cars the Commission considered in arriving at the "fair share of cars" to which Jacoby & Co. were entitled. *The entire record before the Commission was not offered in evidence in the trial Court by the Pennsylvania Railroad Company.* A part of the record before the Commission was offered as tending to show that "there was no testimony before the Commission upon which to predicate the finding which they made as to the amount

of damages." This offer was objected to on the ground that the whole record should have been offered, and the Court sustained this objection (Record, p. 75). No assignment of error is urged in argument to this ruling of the Court. Plaintiff-in-error's case, therefore, depends upon its own evidence. This consisted of one exhibit, taken from among the numerous exhibits filed before the Commission. From this alone the Court was asked to infer that the Commission made its calculation as to what number of cars Jacoby & Co. were entitled to during the period from April, 1904, to October, 1905, according to a certain method, which the plaintiff-in-error then seeks to show was an incorrect method. To establish this plaintiff-in-error claims that the Commission, in finding the discrimination and before making the award, had prescribed another method for future car distribution, (after November 1st, 1910) in that coal field.

I.

On plaintiff-in-error's own showing the Commission computed damages on the basis of an honest administration of the rule of car distribution which plaintiff-in-error pretended to be administering prior to 1906. Since the rule of car distribution provided for in an order by the Commission in 1910 was for the future only (Record, pp. 36, 37), and since, by reason of plaintiff-in-error's own misconduct, such rule would not have offered a safe basis for assessing damage in 1904-5, plaintiff-in-error has no standing to object to an assessment of damages on the basis of its own rule then in force.

The plaintiff-in-error did not put in evidence the whole record before the Commission; nor did it offer in evidence the Commission's report in the Hillsdale

case, referred to in the first report filed in the Jacoby case (Record, p. 35). The report in the Hillsdale case is merely brought in by the citation, on argument, of one paragraph or such report, which citation is again quoted in the Petition for Reargument filed by plaintiff-in-error (p. 5). This quotation, taken out of its proper connection, is misleading, and it may be proper, since the plaintiff-in-error has gone into this, for the defendants-in-error to state just what was the situation developed by the Commission in these cases, as shown by the report in the Hillsdale case, which is referred to by the Commission in its report in this case, (Record p. 35).

In the Hillsdale case, Mr. Commissioner Harlan said (19 I. C. C. Rep., p. 362):

> "We come now to the practice of the defendant in the past and at the present time in the distribution of its available coal-car equipment.
>
> "Under a rule announced by it on February 1, 1903, the defendant seems to have charged all railroad cars, regardless of ownership, and private cars not owned by the operator loading them, against the distributive share of each mine, but it treated its own fuel cars as a special allotment in addition to the distributive share. On March 28, 1905, a notice was sent to shippers of bituminous coal from mines on the lines of the defendant advising them that thereafter all railroad cars, regardless of ownership, and all private cars not owned by the operator loading them, should be considered as cars available for distribution, except its own company fuel cars and fuel cars sent upon its lines by foreign companies and specially consigned to particular mines.
>
> "On January 1, 1906, the defendant divided all cars into two classes, which it designated as 'assigned' and 'unassigned' cars. In the former class were its own fuel cars, foreign Railway fuel cars, and individual or private cars loaded by their

owners or assigned by their owners to particular mines. The rule then made effective and still in force provides that the capacity in tons of any 'assigned' cars shall be deducted from the rated capacity in tons of the particular mine receiving such cars, and that the remainder is to be regarded as the rated capacity of the mine in the distribution of all 'unassigned' or system cars."

The discriminations here complained of occurred between April, 1904, and October, 1905, when plaintiff-in-error had in pretended operation a rule of car distribution, by which "assigned" cars were disregarded, and all cars were assigned alike, *except its own "company* fuel cars," and (*after March, 1905*) fuel cars of other railroad companies. *And if plaintiff-in-error had administered such rule fairly and honestly, there would have been no complaint filed by these shippers.*

But the alleged rule was not fairly or honestly administered. It was only an apology for a rule, while the plaintiff-in-error was in fact carrying on a most notorious system of preference to favored shippers, such preference being administered by special acts of favoritism inspired by a definite preferential purpose. Thus Mr. Harlan says, in the Hillsdale report (19 I. C. C. Rep., p. 366):

> "That the practices of the defendant with respect to the rating of mines and the distribution of coal-car equipment were, to some extent at least, in a loose and unsatisfactory condition prior to 1905 not only appears in this record, but in the record of the coal and oil investigation made by the Commission under the joint resolution of the Congress approved on May 7, 1906. There seems at that time to have been a more or less well-defined policy on the part of the defendant to discourage the opening of new coal operations."

The complaints of W. F. Jacoby & Company and

Clark Brothers Coal Mining Company arose upon exactly the same facts, and the Commission covered both claims in its report (Record, p. 30) and its supplemental report (Record, pp. 18-19). This suit was brought by Jacoby & Company to enforce the order of reparation by the Commission, but after the report of the Commission finding the discrimination, Clark Brothers Coal Mining Company did not await an order of reparation by the Commission, but brought its action for damages in the State Court of Pennsylvania. The case finally reached this Court, where it was held that the State Court of Pennsylvania did not have jurisdiction, but that Clark Brothers Coal Mining Company was limited to the remedy provided in Section 9 of the Act to Regulate Commerce.

In the case of *Pennsylvania Railroad Co. vs. Clark Brothers Coal Mining Co.*, 238 U. S. 456, this Court, by Mr. Justice Hughes, at page 460, reviews fully the report in the case of *Hillsdale Coal & Coke Co. vs. Pennsylvania Railroad Co.*, 19 I. C. C. 356, and the reports of the Commission in the present case (Record, pp. 18, 19, 30), which also covers the claim of Clark Brothers Coal Mining Company, both as to the finding of discrimination and damages, and then says (p. 463):

> "The Commission then made its report as follows: 'We now find that the damages sustained by this claimant (Clark Bros. Coal Mining Co.) as result thereof' (the discrimination found) 'amounted to $31,127.96, and that it is entitled to an award of reparation in that sum, with interest from June 25, 1907.' "

The finding on the Jacoby & Company claim was exactly the same, except in the amount of reparation (Record, p. 18.) This Court then says (p. 463):

> "The Commission set forth its primary findings of fact upon which this ultimate finding was

based, showing its calculations with respect to shipments, selling prices, cost of production and profits during the times in question. It found the number of tons, in case of each of the mines, actually shipped and the amount which would have been shipped and sold, with *a proper car supply*, for 'interstate destinations,' that is, for points without the State of Pennsylvania." (Italics ours.)

This is just as applicable to the Jacoby & Company claim as that of the Clark Brothers Coal Mining Company, and covers every necessary finding by the Commission upon which to base its order for reparation. See *Meeker & Co. vs. Lehigh Valley Railroad Co.*, 236 U. S. 412; *Mills vs. Lehigh Valley Railroad Co.*, 238 U. S. 473 (at p. 477). The Commission finds what tonnage Jacoby & Company would have shipped if they had received "their fair share of the cars available for distribution" (Record, p. 18), and upon that basis made the order for reparation, and the jury in the District Court having heard the plaintiff-in-error's defence, rendered a verdict for the amount found by the Commission, and judgment was entered by the District Court for that amount. The plaintiff-in-error now says that the Commission was wrong in the amount of damages awarded, because in arriving at the tonnage which Jacoby & Company would have shipped if they "had received their fair share of the cars available for distribution," the Commission erroneously counted cars which should not have been fairly counted, and in support of its contention the plaintiff-in-error referred to the order of 1910, made by the Commission for the future (Record, pp. 36-7), and offered in evidence, not the entire record before the Commission, but one exhibit out of that record, to show that the tonnage which the Commission found Jacoby & Company would have shipped if they had had their "fair share of cars" could

not have been shipped by them under the system of distribution prescribed by the Commission in its order for use after November 1, 1910.

To this we answer: that the question of what cars should have been counted during the period, April, 1904, to October, 1905, in order to make a fair *pro rata* distribution of coal cars among shippers, was an *administrative question*, to be determined by the Commission on the whole record before it, and this Court will not undertake to substitute its judgment for that of the Commission upon this administrative question. In finding the cars to be counted in the distribution, it was not necessary that the Commission should adjust the car distribution during the period, April, 1904, to October, 1905, to the basis of distribution ordered by the Commission after November 1, 1910. Other elements were involved during the period covered by the complaint, to wit, the rule of distribution of the railroad company referred to in the Hillsdale case; the fact that the railroad company made a daily special distribution of 500 of its cars to Berwind-White Coal Mining Company (Record, p. 34); the fact that the railroad company sold 1,000 of its own system cars to Berwind-White Coal Mining Company (Record, p. 35); the fact that coal in cars furnished for railroad fuel coal got into commercial competition in the market—all these, and other facts before the Commission might well have justified it in finding the fair proportion of the cars to which the defendants-in-error were entitled during this period, and not adjusting the basis of its finding to the system of distribution provided for the future. In finding what is a fair distribution of cars, the Commission is not bound by a "hard and fast rule," but especially as to past transactions, adjusts its finding to the facts before it in that particular case. *Morrisdale Coal Co.*

vs. Pennsylvania Railroad Co., 230 U. S. 304, at pp. 312-13.

The award was made by the Commission based "upon evidence adduced of record" (Record, p. 18), and yet this Court is asked to reverse the finding of the utlimate facts as to the tonnage Jacoby & Company would have shipped if they "had received their fair share of the cars available for distribution," and substitute the judgment of this Court as to what cars should have been counted by the Commission in the exercise of its administrative discretion, and that, too, upon a part only of the record before the Commission.

The figuring by the plaintiff-in-error of percentages to show what cars Jacoby & Company should have received during the period from April, 1904, to October, 1905, if the rule prescribed by the Commission for use after November 1, 1910 (Record, p. 37) had been applied to that period, can have no bearing in this case. The rule for the future (after November 1, 1910) may well have been considered by the Commission as inapplicable to the period from April, 1904, to October, 1905, when the railroad company had a rule providing for counting practically all cars and violated this rule, and upon all the facts the Commission found what would have been the tonnage shipped by Jacoby & Company if they "had received" what the Commission concluded in its administrative discretion woud have been "their fair share of the cars available for distribution," which necessarily involved the question of what cars should, during that period, have been counted for the *pro rata* distribution; and we submit that this Court should not set aside the Commission's conclusion and substitute therefore what *it* may conclude was Jacoby & Company's "fair share of the cars."

How improperly and unfairly this whole system

of alleged private and fuel cars was carried on by the plaintiff-in-error, was very fully shown before the Commission, and is to some small extent referred to in this record. Thus it appears that all shippers did not enjoy the right to put on private cars, while to certain favored shippers the plaintiff-in-error was so complaisant that it "sold" them its own cars, which thereafter appeared as their private cars. (19 I. C. C., p. 395.) Nor were the company fuel cars more honestly administered; for the company fuel coal reappeared in the market in competition with the coal of the independent shippers (Record, p. 118). There were many other abuses, some of which are referred to in the Commission's reports; but the above will indicate how little confidence could be placed by the Commission in the plaintiff-in-error's classification of cars in this coal field.

The Commission was therefore confronted with this situation: Prior to 1906, plaintiff-in-error pretended to assign all cars (except certain *alleged* fuel cars) *pro rata* to all shippers alike, but did not do so; after 1906, defendants-in-error put into effect a new rule of distribution based upon "assigned" cars and rated mine capacity, calculated by deducting from each mine's tonnage the tonnage of such "assigned" cars.

In such a state of affairs, the Commission was unable to adjust the past situation upon the basis of any rule of car distribution for the future. The new system of "assigned" cars and commercial ratings, put into force in 1906, was found to be in effect a cover for discrimination. As the Commission said in the Hillsdale case, only "substantial justice" could be done, and such substantial justice could only be accomplished by requiring "defendant to adjust its rules upon a proper basis *for the future*," and giving "to the com-

plainants the opportunity to have their injury redressed in the form of damages." (19 I. C. C., p. 366.) Both these things the Commission attempted to do upon all the facts before them, which facts were not offered in evidence by plaintiff-in-error, in the District Court and are not before this Court.

The injury to defendants-in-error had occurred between April, 1904, and October, 1905, during the period when there was no fair system of car distribution, honestly administered, in effect in this region. The system of "assigned" cars did not then exist. Plaintiff-in-error was then avowedly distributing all cars alike, regardless of ownership, and should have honestly done so. That it did so no one has attempted to affirm. It is immaterial here that plaintiff-in-error put the "assigned" car system in effect in 1906, or that the Commission, in 1910, declared that such system was discriminatory and prescribed a new system for the future. None of this can have any bearing upon the old method or want of method in force prior to 1906, when the injury to W. F. Jacoby & Company occurred; and plaintiff-in-error had no standing to require that the Commission, in awarding damages, should attempt to apply its new system of car distribution to the conditions existing prior to 1906; even if this were possible, which does not appear.

The Commission was not obliged to compute past damages upon the basis of its rule announced for "the future." It may well have been impossible for it to do so. During the period when the injury to defendants-in-error occurred, plaintiff-in-error did not recognize "assigned" cars, as a basis for distribution, nor does it appear that there was any way by which the Commission could have determined what were and what were not *bona fide* "assigned" cars during the period prior to 1906.

The plaintiff-in-error's theory therefore amounts to this: That the Commission, confronted by the situation in 1904-5 made no attempt to assess damages on the basis of its rule announced in 1910 for the future, but instead accepted the plaintiff-in-error's own rule, supposed to be in operation in 1904-5, and found as damages the difference between the tonnage in cars actually received by defendants-in-error and the tonnage which defendants-in-error would have received if the plaintiff-in-error had honestly administered its own rule of distribution, in effect or pretended effect in 1904-5.

It is hard to see how plaintiff-in-error could have any standing to complain of this measure of damages, if it were in fact the measure of damages applied. The Commission would be merely judging plaintiff-in-error out of its own mouth. Having declared that it was distributing its cars upon a certain basis, and having, by its own acts, made it practically impossible for the Commission to assess damages upon any other basis, it is certainly a remarkable proposition that plaintiff-in-error can demand that the Commission assess damages on the basis of a rule for the future, announced five years later, especially since in making such assessment, the Commission would have to accept as verity plaintiff-in-error's own statement as to what were and what were not entitled to be called "assigned" cars in 1904-5, when plaintiff-in-error did not recognize "assigned" cars as a basis for distribution.

There is no point in plaintiff-in-error's assertion (petition, pp. 2, 5) that a confusion as to the proper method of car distribution may result from the decision in this case. The Commission has now fixed a system of car distribution, just as it often fixes new systems of rates. That system would not be disturbed

by an award of damages, however made up, based upon a former system of car distribution in existence long before the new system was prescribed or put into effect.

II.

Since there was nothing offered by the plaintiff-in-error in this record to establish the method of computation used by the Commission, it would have been error for the Court to instruct the jury that the Commission's finding of damage was based upon a particular method, such finding alone without other parts of the record, containing no reference to the method used by the Commission in making its award, and the record before the Commission not being in evidence.

In the case of *Mitchell Coal Co. vs. Pennsylvania R. R. Co.*, 230 U. S. 247, at page 257, the Court through Mr. Justice Lamar, says:

> "But where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case,—thereby giving every shipper equal rights and preserving uniformity of practice."

And again, at page 258, it is said:

> "It is argued that under the *Abilene, Robinson* and *Pitcairn Cases* this may be true as to existing rates in which the public have an interest, but it is urged that a claim based upon the unreason-

ableness of past rates and discontinued practices raises a judicial question, of which the courts and not the Commission have jurisdiction.

"There are several answers to this proposition. In the first place, the plaintiff cannot claim under the act and against it. To say the least, it is extremely doubtful whether, at common law, one shipper had a cause of action because the carrier paid another shipper more than the market value of transportation services rendered to the carrier. *I. C. C. v. B. & O. R. R.*, 145 U. S. 263, 275. But if any such right existed it was abrogated or forbidden by the Commerce Act, and one was given which, as a condition of the right to recover, required a finding by the Commission that the allowance was unreasonable and operated as an unjust discrimination or as an undue preference. *Texas &c. Ry. v. Cisco Oil Mill*, 204 U. S. 449; *Texas &c. Ry. v. Abilene Co.*, 204 U. S. 426, 444; *Southern Ry. v. Tift*, 206 U. S. 428, 437; *United States v. Pacific & Arctic R. R.*, 228 U. S. 87. Such orders, so far as they are administrative are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers, who have been or may be affected by the rate, can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial and only *prima facie* correct in so far as they determine the fact and amount of damage—as to which, since it involves the payment of money and taking of property, the carrier is by Section 16 of the act given its day in court and the right to a judicial hearing. (March 2, 1889, 25 Stat. 855, 859, c. 382)."

See also, our brief heretofore filed.

The plaintiff-in-error is seeking to reopen here certain questions of fact which were finally determined before the Commission, and it is seeking to do so on the basis of a very small part of the evidence which was before the Commission.

If this can be done, the Commission's finding is not an aid but a detriment to a complainant before that body. For, after the Commission has heard all the evidence and has properly ruled on the discrimination, and has made an award, the defendant can assert in the trial Court that the Commission's award was improperly made up; can introduce such parts of the evidence as support its theory; and can assert its theory against the award, even after the award has been approved by the verdict of a jury.

It may very well be questioned, whether, under the peculiar circumstances of this case, as above set forth, the trial Judge did not go unduly far in charging the jury in plaintiff-in-error's favor, on the question of damages, but plaintiff-in-error, notwithstanding, insists that the Court should have left nothing to the jury, but have directed them that the award was invalid.

The trial Judge could not know what was in the mind of the Commission when it made up its award. He could at best only infer or assume, and neither inference nor assumption on a question of fact has a place in courts of law. The Court allowed plaintiff-in-error to introduce one exhibit, on which such an inference might be based; but this inference was confronted by a counter inference, at least equally strong, that the Commission knew what it was about. The Court, therefore, left to the jury the question whether damages had been assessed upon the theory advanced by plaintiff-in-error. The jury evidently preferred to believe that the Commission correctly made up the award.

To go back and attempt to discover the basis upon which such award was computed by the Commission is now a hopeless matter on the present record. The case

is not one which can be met by a discussion of possibilities or even of probabilities. Clearly the rule of car distribution appealed to by plaintiff-in-error was present in the mind of the Commission when that body found discriminations and made an award. It cannot be presumed or even inferred that they deliberately computed such award on an unfair basis. The Commission did not and is not required to set forth its calculations in detail in its report. It properly found the ultimate facts, which was all that the Act requires. *Mills vs. Lehigh Valley R. R.*, 238 U. S. 473, at pp. 481-2. The trial Court went to the end of its powers in allowing the jury to find whether damages had been properly computed and allowed. The award, as affirmed by the jury, should be conclusive here.

A few words may be said by way of showing further the difficulty of impeaching or opening the award at this stage of the case. It has already been stated that the *bona fides* of private car ownership and fuel car distribution in this field was gravely impeached. There had been pretended transfers of the railroad's own cars to private ownership; there was fuel coal, which, in some mysterious manner, found its way into the market. A hint of this found its way into the record here, but there was much of it in evidence before the Commission. It is, therefore, insufficient to say that such and such private and fuel cars were not excluded from the account before distribution; for the Commission may very well have believed that such cars were not *bona fide* entitled to be so excluded. *This, in itself, would justify the award*, even granting that such award merely repeated the calculation in the one exhibit, put in evidence by the plaintiff-in-error.

Moreover, it will be remembered that the Commission's finding of discriminations practiced by plaintiff-

in-error against these defendants-in-error was not limited to the one matter of the assignment of regional cars among the mines in this one division or district. There were also found to be discriminations practiced against the whole district by the arbitrary assignment of cars to favored mines on other branches of the railroad. Both these discriminations formed the basis of the complaint filed; and the sum claimed in damages was based upon both. The Commission presumably considered both, for it had found discrimination in both respects. The Court and the jury were therefore under no compelling necessity to infer that the award of damages, as handed down, was based entirely upon the one kind of discrimination.

In *Meeker v. Lehigh Valley R. R. Co.*, 236 U. S. 412, this Court said (p. 429):

> "The plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss; and, in view of the recital that the findings were based upon *the evidence adduced*, it must be presumed, there being no showing to the contrary, that they were justified by it." (Italics ours.)

The same situation exists here as in the Meeker case. The supplemental report of the Commission (Record, p. 18), finds, "upon evidence adduced of record" (Record, p. 18), that:

> "By reason of the *discriminations* ascertained and set forth in our report in Jacoby v. P. R. R. Co., 19 I. C. C. 392, the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28, 1907. The claimants here demand $51,950.49. *The award above made we base upon evidence adduced of record, from which we find.*" (Italics ours.)

The Commission then finds that "if the complain-

ants had received "their fair share of the cars available for distribution" the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods."

In the Meeker case, it was alleged (236 U. S. 412, p. 428) "that the reports disclose that the Commission applied an erroneous and inadmissible measure of damages, and therefore that no effect can be given to the award"; but this Court, after quoting the language of the award, said (p. 428): "In this we perceive nothing pointing to an erroneous and inadmissible measure of damages."

Certainly the same might be said in the present case, unless it is to be held that the Commission's finding of the tonnage that defendants-in-error were entitled to have shipped in the period from April, 1904, to October, 1905, was erroneous, because it did not conform to a system of car distribution prescribed by the Commission for use after November 1, 1910.

There are few persons who could defend the system of car distribution in the Clearfield Division in the years 1904-5, a period in which certain favored shippers made vast fortunes, while certain other shippers were unable to operate and were ruined or forced out of business. The conditions then existing may have been relieved by the activity of the Commission, and facilities of car distribution have been sensibly relaxed in view of the changed conditions, and under the rule for future distribution announced by the Commission in 1910. But it was during 1904-5, a period of general disregard or evasion of the law by plaintiff-in-error and its favored shippers, that this case arose, and it has been carried from point to point, with great labor and expense, until, after a lapse of eleven years (which

period has been spent not in silence or delay on the part of these defendants-in-error, but in active prosecution of their claim), the matter comes up for final disposition in this Court. There has been an award by the Interstate Commerce Commission, a verdict of a jury, and a judgment of a Court in favor of the complainants. They are now, in the Court of last resort, met with an objection, based upon an inference as to matters occurring before the Commission not in evidence, and upon a theory as to the state of mind of the Commission when making up its award in 1912.

It is respectfully submitted that this Court should refuse to consider or pass upon such matters, and should sustain the findings of the Commission, as confirmed by the verdict and judgment in the trial Court, and that the judgment below should be affirmed.

III.

Plaintiff-in-error has also requested that the judgment be modified, so as to set aside the judgment for counsel fee allowed for services rendered before the Interstate Commerce Commission. Since this question has been decided by this Court in the Meeker case, the matter is not in dispute, and defendants-in-error stand ready to submit to such order, or to enter a remittitur, as this Court may prescribe.

REPLY BRIEF OF PLAINTIFF-IN-ERROR.

In a brief just filed by plaintiff-in-error, entitled "Reply Brief of Plaintiff-in-Error," at page 3, we find the following:

> "The Commission found that the defendants-in-error should have received in these two periods 59.9 per cent. and 59.6 per cent. respectively, of

were the days (275 and 138¼ days respectively) which the mine actually worked. The Commission found the tonnage that defendants-in-error would have shipped *in the two periods*, (not for 275 days and 138¼ days, respectively) if they had been given their fair proportion of cars.

Aside from this, however, the above quotation from the plaintiff-in-error's reply brief is an incorrect statement of fact. The Commission found (Record, p. 18) that defendants-in-error were only able to actually operate their mine for 275 days in the first period and 138¼ days in the second period. Referring to this finding of the Commission the plaintiff-in-error, in its brief, refers to Record, p. 110, to show that the total capacity of the mine for 275 days, at 450 tons per day, was 123,750 tons, and for 138¼ days, the second period, the total capacity at 450 tons a day, was 62,212.51 tons, and the witness Sanders, at page 110, then adds the shipments which were actually made by defendants-in-error during the first period (38,714.23 tons), to the additional tonnage which the Commission found the defendants-in-error would have shipped if they "had received their fair share of the cars available for distribution" (35,412.02 tons), and arrives at a total of 74,126.25 tons, which amount is 59.9 per cent. of 123,750 tons, (the total capacity for 275 days), and therefore the plaintiff-in-error asserts that the Commission based its conclusions upon the defendants-in-error shipping the same percentage as the preferred shippers, to wit, 59.9 per cent., which was based on 308 days. A like method is used by the plaintiff-in-error by which it arrives at the conclusion that the Commission found that the defendants-in-error would have shipped 59.6 per cent. of their rated capacity for 138¼ days during the second period. Plaintiff-in-error then says that it is evi-

dent that the Commission based its conclusions upon the defendants-in-error being entitled to ship the same percentage of the rated capacity of their mine, as those mines shipped, which were preferred in the distribution. The percentages above were based upon the mine only being able to operate even with the additional shipments found by the Commission, for the 275 and 138¼ days respectively, the time which the mine actually operated under the unfair allotment of cars, whereas the average percentages of the favored shippers were based on a car supply which enabled them to operate their mines for 308 and 167 days respectively (Record, p. 104-5).

This statement of plaintiff-in-error is clearly incorrect. The average percentage for the first period of 59.9 per cent., and for the second period of 59.6 per cent. (Record, pp. 104-5), was based upon the rated capacity for 308 days and 167 days respectively, and if the defendants-in-error had shipped the amount of coal which the Commission found that they would have shipped in addition to their actual coal shipments for the 308 days, out of the period of one year, they would have shipped during the first period 53 per cent. of their rated capacity, and during the second period of 167 days between April and October, 1905, 49 per cent. of their rated capacity, as against the average percentages of the twelve preferred mines of 59.9 per cent. during the first period and 59.6 per cent. during the second period.

The Commission had before it all of the distribution sheets and a complete record of the methods of car distribution, and upon all these facts found that for the period April, 1904, to March 31, 1905, if defendants-in-error "had received their fair share of the cars available for distribution", they would have shipped 35,412.02 additional tons of coal, and for the second period, April 1st to October 18th, 1905, 19,104.77 additional tons of coal. This is dependent upon the finding by the Commission as to what cars should have been counted and what should have been the basis of distribution of the cars, and what would have been a fair distribution.

We submit that the conclusion of the Commission upon that question is a final conclusion.

The Commission then finds that defendants-in-error were damaged, and sets forth its method of arriving at the damage (Record, p. 18—(c), (d), (e)—), and this finding of the Commission was entitled only to *prima facie* effect, all of which was submitted to the jury, under a charge certainly as favorable as the plaintiff-in-error could have reasonably asked, and we, therefore, submit that the finding of the Commission as to what should have been the system of car distribution and the tonnage which defendants-in-error would have shipped upon such fair distribution of cars, is conclusive, and that the finding of the jury on the question of damage affirming the finding of the Commission, which made a *prima facie* case, is conclusive in this Court.

Again, at page 3 of their reply brief, counsel for plaintiff-in-error say:

> "The testimony established that in the two periods which the Commission's award dealt with, the cars placed at the mines in the region in which the defendants-in-error's mine was located,

amounted to 30.3 per cent. and 39.9 per cent., respectively, of the aggregate ratings of the mines in the region. (Transcript of Record, p. 123.)"

The fact that the number of cars for the two periods in the region represented 30.3 per cent. and 39.9 per cent. of the aggregate rating of the mines in the whole region, can have no bearing upon the Commission's conclusion as to what the *actual distribution* of cars should have been and what tonnage under that distribution should have been shipped by defendants-in-error, for the reason that the plaintiff-in-error leaves out of calculation the great number of mines which appeared before the Commission as voluntarily not shipping coal at all, during these periods (Record, p. 115-6), and any cars to which such mines would have been entitled had they been shipping, were subject to pro rata distribution to the mines which were actually shipping coal. If all of the mines had been shipping coal, according to the plaintiff-in-error's theory, no mine could have properly gotten more during the first period than 30.3 per cent. of its rated capacity, and during the second period 39.9 per cent. of its rated capacity, yet Standard No. 7 mine, during the first period, had 88.9 per cent. of its rated capacity, and during the second period 76.8 per cent. of its rated capacity; and the twelve mines owned by the preferred shippers, during the period as a rule had more than double the cars which they would have gotten if all the cars in the region had been distributed to all the mines in the region on the capacity basis. The only conclusion that could be drawn by the Commission, and by the jury, was that the plaintiff-in-error had cars subject to pro rata distribution by reason of certain of the mines voluntarily not working, which they gave to preferred shippers instead of distributing pro rata.

Wm. A. Glasgow, Jr.,
Counsel for Defendants-in-Error.

October, 1916.